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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 268

GEORGE C. BENNETT,

Petitioner,

v.

JULIUS DE GEETER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES OF THE STATE OF NEW JERSEY.

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THE COURT PRESS, N. Y. C.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES OF THE STATE OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, above named, prays that a Writ of Certiorari issue to Review a Final Decision and Decree of the Court of Errors and Appeals in the Last Resort of All Causes of the State of New Jersey filed in the above case on May 24, 1943. Petition for Reargument was denied May 25, 1943.

SUMMARY STATEMENT OF MATTER INVOLVED.

Under the Constitution of the State of New Jersey the fundamental distinction between law and equity still prevails. The New Jersey courts of law function separately from the court of chancery of that State and the jurisdiction of each court is exclusive of the other.*

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* New Jersey Constitution Article VI, Sec. I; *San Giacomo* v. *Oraton Inv. Co.*, 103 N. J. Eq. 273.

In the instant matter, the New Jersey Court of Chancery has exceeded its jurisdiction as prescribed by the Constitution of that State by having determined the legal rights of the petitioner and by perpetually enjoining the prosecution of a prior pending action instituted by the petitioner in the New Jersey Supreme Court which under the State Constitution has exclusive jurisdiction to determine the legal issues raised therein.*

In December 1938, petitioner commenced an action at law in the New Jersey Supreme Court in which he sought damages for breach of contract pursuant to which the petitioner rendered valuable services to the respondent. The complaint at law (R., p. 39) contained two counts (1) for damages for breach of an express agreement and (2) for the reasonable value of petitioner's services upon *quantum meruit*. The respondent joined issue in the law action. The sufficiency, in law, of the complaint was thrice upheld by the law court (R., pp. 57, 60, 62).

In June 1941, the respondent, fearing the hazards of a jury trial (R., p. 35, ll. 1-10) undertook to change the forum wherein the matter would be adjudicated. An application for injunction was made by respondent to the Court of Chancery. The sole ground for the application for injunction being respondent's alleged fear that petitioner might prove in the action at law the existence of a partnership although respondent unequivocally denied the existence of such a relationship. Petitioner moved to strike the bill for injunction upon the ground that no equitable cause of action was set forth and that peti-

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* The established rule is that upon a denial of equitable relief, the Court of Chancery is without jurisdiction to decide legal issues which under the New Jersey Constitution are solely cognizable in the law courts of that State. *Soper* v. *Conly*, 107 N. J. Eq. 537; *Collier* v. *Collier* (N. J. Ch.), 33 Atl. 193 (not officially reported); *Logan* v. *Flatteau*, 73 N. J. Eq. 222, citing *Welsh* v. *Bayard*, 21 N. J. Eq. 186; *30 Corpus Juris Secundum*, Sec. 73, at page 427; *Freeman on Judgments*, 5th Ed., Vol. 2, page 1252; *Note 19 L.R.A.* (N. S.) 1064, at page 1064; *19 Am. Jur.*, Sec. 132, citing *Clark* v. *Wooster*, 119 U. S. 323.

tioner's complaint at law had been repeatedly sustained as cognizable at law (R., p. 54); when such motion was denied him, petitioner interposed a counterclaim or cross-bill (R., p. 67) in chancery under which he asked the court to construe the relationship between the parties and sought a dissolution and an accounting in the event the Chancellor found that a partnership or joint venture, in fact existed.

Upon final hearing of the suit in Chancery the Vice Chancellor decided that the relationship between petitioner and respondent was that of employee and employer and denied the petitioner the equitable relief prayed for under his counterclaim in the event that it should have been found that the relationship was a partnership, and yet on the other hand perpetually enjoined petitioner from prosecuting his prior pending action at law.

Petitioner appealed to the New Jersey Court of Errors and Appeals and on May 18, 1943 the said Court of Errors and Appeals, by a vote of 8 to 5 affirmed the decree of the Court of Chancery enjoining the prosecution of the action at law (R., p. 454).

Of the 5 members of the Court who dissented, one was the Chief Justice and 4 were Justices; of the 8 who voted to affirm, 3 were Justices and 5 were Lay Judges.

By this decision the Court of Errors and Appeals deprived the petitioner of any hearing whatever on the question of his legal rights as asserted in his prior pending action at law and permanently enjoined him from prosecuting the action at law and thereby deprived petitioner of his right to due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Since the Court which issued the injunction and in which the only trial has been had is a court which had no jurisdiction under the Constitution of that State, its determination of petitioner's legal rights as asserted in the action at law deprives petitioner of the equal pro-

tection of the laws of the State of New Jersey and violates the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

Facts.

The petitioner was an experienced contractor and builder and had also operated skating rinks. He was well acquainted with sources of material and capable of supervising the construction work. The respondent was desirous of engaging in the skating rink business and to that end enlisted the services of the petitioner. The record is replete and conclusive as to petitioner's services which were rendered over a period of approximately twelve months and consisted of assisting in locating a site, grading it, preparing plans and material lists, ordering materials and supervising the construction of the rink. The respondent admitted that he did not pay the petitioner for these services, the explanation being that respondent "never had a chance to pay him" (R., p. 167; also R., p. 431).

It was to recover his compensation for these services that petitioner instituted his action in the New Jersey Supreme Court; but he is prevented from prosecuting said law action by reason of the injunction of the Court of Chancery which injunction has been affirmed by the New Jersey Court of Errors and Appeals as hereinbefore stated.

Jurisdiction.

This Petition for Certiorari is filed under Section 344 of Title 28 of United States Code (Judicial Code Section 237, as amended).

The decision of the Court of Errors and Appeals of New Jersey was rendered on May 18, 1943 (R., p. 454), and the final decree of that court was filed on May 24, 1943 (R., p. 456).

The petitioner raised the objection to jurisdiction at the very first opportunity in the Court of Chancery, on the motion to strike the bill (R., p. 54), on the opening of the hearing (R., p. 105), on the motion to dismiss (R., p. 194), on the motion for leave to reopen the hearing (R., p. 199), in the objections to the proposed final decree (R., p. 23). The constitutional question was again raised in the petition for appeal to the New Jersey Court of Errors and Appeals (R., p. 7, para. O). The constitutional question was stressed in petitioner's brief before that court and in the petition for reargument. The decision of the New Jersey Court of Errors and Appeals could not have been rendered without deciding the constitutional questions raised by petitioner's brief before that court, and in the petition for reargument.

Questions Presented.

1. May the Court of Chancery of New Jersey by injunction prevent the prosecution of an action at law for breach of contract and for the reasonable value of services which said action at law is exclusively cognizable in the courts of law of New Jersey under the Constitution of the State of New Jersey where there has been no trial of the issues by a court of competent jurisdiction?

2. Does not the restraint of petitioner by injunction from prosecuting his legal claim for services rendered at the special instance and request of the respondent who admittedly received the benefit thereof and who on the hearing in chancery admitted that he did not compensate the petitioner therefor, amount to a deprivation of petitioner's property rights without due process of law and a denial of the equal protection of the laws of the State of New Jersey in violation of the Fourteenth Amendment of the Constitution of the United States?

3. Did not the adjudication by the Court of Chancery

of legal issues which under the New Jersey State Constitution are made exclusively cognizable by the courts of law, amount to a deprivation of petitioner's property rights without due process of law and did not such unconstitutional arbitrary usurpation of jurisdiction by the chancery court deprive the petitioner of due process of law and of the equal protection of the laws of the State of New Jersey in violation of the Fourteenth Amendment of the Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The New Jersey Court of Errors and Appeals, the Court of Last Resort of All Causes of the State of New Jersey, by affirming the decree of the Chancellor of the State of New Jersey, has decided an important question of law affecting the property and vested property rights of this petitioner, thereby creating and establishing a law contrary to the rule of the common law and repugnant to and violative of applicable provisions of the Constitution of the State of New Jersey, the Constitution of these United States of America and the decisions of this Honorable Court, to wit:

(a) It amounts to a deprivation of the natural right of this petitioner under the New Jersey State Constitution to prosecute in the law courts of the State of New Jersey his claims for damages for breach of contract and for the reasonable value of services rendered to the respondent at his special instance and request and of which respondent received the benefit and

(b) It deprives this petitioner of his property without due process of law contrary to and in violation of the Fourteenth Amendment of the Constitution of these United States of America, in that the New Jersey Court of Chancery exceeded its jurisdiction under the New Jersey State Constitution and de-

cided legal issues which were exclusively cognizable in the New Jersey Supreme Court wherein an action was and is pending but which action the Court of Chancery, wholly without power and jurisdiction, has perpetually enjoined petitioner from prosecuting.

(c) It deprives the petitioner of the equal protection of the laws of the State of New Jersey, in that he is enjoined, by the arbitrary and unconstitutional decree of the Court of Chancery, from enforcing in the court of law his legal demands for damages for breach of contract and for compensation for his services.

(d) The decision of the Court of Errors and Appeals affirming the decree of the Chancellor which perpetually enjoined the prosecution of petitioner's action at law took away all remedy for the enforcement of a right; it is not within the power of the State of New Jersey so to do. *Poindexter* v. *Greenhow*, 114 U. S. 270; see also 31 L. R. A. 70.

(e) That in the event petitioner is not given relief by the United States Supreme Court, he has no further recourse and will be without a remedy to enforce his legal right to compensation for services rendered upon *quantum meruit*.

(f) The decree of the Court of Chancery enjoining the prosecution of petitioner's prior pending action at law is not due process of law since it was rendered by a court without jurisdiction. "Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction", *Twining* v. *New Jersey*, 211 U. S. 110, citing *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8.

Wherefore, it is respectfully submitted that the within petition for a Writ of Certiorari be granted to the end that this cause may be reviewed and the judgment of the New Jersey Court of Errors and Appeals affirming the decree of the New Jersey Court of Chancery and the decree so affirmed may be reversed by this Honorable Court and that the petitioner may have such other and further relief in the premises as may be just.

August 16, 1943.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The opinion of the New Jersey Court of Errors and Appeals, filed May 24, 1943, is reported in 133 N. J. Eq. 349 and appears in the record, page 449. The opinion of the New Jersey Court of Chancery is not officially reported but is printed in the record, page 11.

Jurisdiction.

The petition for Certiorari was filed August 17, 1943; it invokes the jurisdiction of this Court under Section 344 of title 28 of United States Code (Judicial Code Section 237 as amended).

The decision of the Court of Errors and Appeals of New Jersey was rendered on May 18, 1943 and the final decree of that court was filed on May 24, 1943. Further jurisdictional facts are stated in the petition (pp. 4, 5).

Constitutional Provisions Involved.

The 14th Amendment of the U. S. Constitution, provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In *Twining* v. *New Jersey*, 211 U. S. 78, this Court said at page 110:

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8."

The Constitution of the State of New Jersey, Article VI, provides:

> "The Judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes as heretofore; a Court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts, and such Inferior Courts as now exist, and as may be hereafter ordained and established by law; which Inferior Courts the Legislature may alter or abolish as the public good shall require."

The Court of Errors and Appeals of New Jersey has held that

> "By the system of courts set up in New Jersey under the constitution, article 6, section 1, the jurisdiction of the equity and common law courts is separate and distinct. The common law courts have exclusive jurisdiction to hear and determine contro-

versies resting upon a purely legal basis and determined by the principles of the common law such as a money claim or a simple debt and the like, whether due or not.

The jurisdiction of equity courts cannot be conferred over this class of subjects, by consent of counsel or acquiescence of a Vice-Chancellor. The Court of Chancery was not competent to adjudicate the claim."

San Giacomo v. *Oraton Inv. Co.*, 103 N. J. Eq. 273.

See also

Richman v. *Schwartz*, 130 N. J. Eq. 495.

The question of the constitutional limitation of the jurisdiction of the Court of Chancery of New Jersey is more fully discussed hereinafter.

Statement.

A statement of the case is contained in the petition (pp. 1-4).

Specification of Errors to Be Urged.

1. The New Jersey Court of Errors and Appeals has deprived petitioner of due process and the equal protection of the laws in that it affirmed the decree of the Court which determined petitioner's legal rights and enjoined the prosecution of petitioner's prior action at law, notwithstanding that

(a) The Court of Chancery, by its conclusion that petitioner was a mere employee, divested itself of the power to determine the legal issues raised in petitioner's prior pending action in the Supreme Court,

(b) The Court of Chancery exceeded its jurisdiction in assuming to determine the legal rights of the petitioner and its adjudication as to petitioner's legal rights is void as being beyond the power of the Court of Chancery to make, and is not due process,

(c) The jurisdiction of the Court of Chancery was limited to a determination of the relationship of the parties and the enforcement of petitioner's equitable rights, if any; Chancery's determination that the relationship was legal and the denial of equitable relief cannot estop petitioner from prosecuting his action at law wherein he seeks legal relief.

2. The New Jersey Court of Errors and Appeals erred in holding that petitioner is barred from proceeding at law by reason of an election of remedies.

3. The affirmance by the Court of Errors and Appeals of the injunction against the action at law is indubitably a violation of due process and a deprivation of the equal protection of the laws since it prevents petitioner from recovering the reasonable value of his services upon *quantum meruit,* which legal right was asserted in the prior pending action at law and the issues thereunder were not raised in Chancery.

The errors urged by petitioner before the Court of Errors and Appeals of New Jersey are set forth in the Petition of Appeal (R., pp. 2-7).

The questions presented upon this application are stated in the Petition, page 5. The grounds relied on for the granting of the writ of certiorari are set forth in the Petition, pages 5, 6.

POINT I.

Having determined that the relationship of the parties was legal and not equitable and having denied petitioner equitable relief, the Court of Chancery of New Jersey was without jurisdiction, under the New Jersey State Constitution, to continue the cause or to determine petitioner's legal rights, and its decree and the affirmance thereof by the New Jersey Court of Errors and Appeals constitute a denial of due process of law and the equal protection of the laws.

The issues in the action in the New Jersey Supreme Court, the trial of which has been enjoined by the decree complained of, are purely legal issues, namely, for damages for breach of contract and for the reasonable value of petitioner's services (R., p. 39). No legal relief was sought by either party in the Court of Chancery. That court in determining that the relationship between the parties was that of employer and employee thereby held that the issue of what, if anything, was owing to the petitioner for his services, was a purely legal issue.

The Supreme Court of New Jersey wherein petitioner's prior action was pending at the time the action in Chancery was brought by respondent was competent under the New Jersey State Constitution to determine the legal issues.

Accordingly, it is clear that petitioner sought the proper remedy in the first place. His rights were legal and not equitable. The issues raised by his action at law were cognizable by the law courts. Chancery had no jurisdiction under respondent's bill and Chancery's jurisdiction under petitioner's counterclaim was wholly dependent upon a determination that the relationship between the parties was equitable and not legal.

When the Court of Chancery determined that the relationship was legal and not equitable and denied equitable

relief, it was wholly without jurisdiction and power to determine the legal rights of the petitioner as asserted in the prior pending action at law.

The exclusive jurisdiction over legal issues of courts of law as opposed to the Court of Chancery over equitable issues in New Jersey has been defined by the Court of Errors and Appeals of New Jersey in the case of *San Giacomo* v. *Oraton Inv. Co., supra,* which was a suit for an accounting. The Court held that the jurisdiction of the equity courts does not exist and cannot be conferred over money claims or simple debts whether due or not due and that the Court of Chancery was not competent to adjudicate the claim. The Court said at page 274:

> "We think the bill should have been dismissed on the ground that the Court of Chancery had no jurisdiction over the subject matter. It could not hear and determine a pure legal question cognizable by the common law courts. The appropriate remedy is by a suit at law.
>
> * * *
>
> The first requisite to constitute jurisdiction is that the Court must have cognizance of the class of cases to which the one to be adjudged belongs.
>
> This principle is elementary and needs no citation of cases."

The denial by the Vice Chancellor to the petitioner of equitable relief, terminated the right of the Court of Chancery to proceed further. Since the Vice Chancellor found that the relationship of the petitioner was that of an employee and not a partner, and denied him relief in equity, the Court of Chancery was wholly without jurisdiction to further restrain the action at law and, equally without power and jurisdiction to determine the legal rights of the parties. The New Jersey Court of Errors and Appeals in the case of *Soper* v. *Conly,* 107 N. J. Eq. 537, and the New Jersey Court of Chancery in the case of

Collier v. *Collier* (N. J. Ch.), 33 Atl. 193 (not officially reported) firmly establish the rule that upon a denial of equitable relief the Court of Chancery is without jurisdiction to decide legal issues which under the Constitution of the State of New Jersey are solely cognizable in the law courts of that State.

See also—

Trotter v. *Heckscher*, 40 N. J. Eq. 612;
Phillips v. *Pullen*, 45 N. J. Eq. 157;
Logan v. *Flattau*, 73 N. J. Eq. 222, citing *Welsh* v. *Bayaud*, 21 N. J. Eq. 186;
30 Corpus Juris Secundum, at page 427;
Freeman on Judgments, 5th Edition, Vol. 2, page 1252.

For extensive correlation of authorities see Note 19 L. R. A. (N. S.) 1064; at page 1065 the note states:

> "Although a few cases are found which can be characterized only as variants from the general rule, the preponderance of opinion in relation to the subject under consideration clearly seems to be that where a case for relief in equity fails, a court of equity is without jurisdiction to award other relief by way of disposing of the entire controversy; unless, indeed, it appears that the remedy at law will be inadequate. Otherwise, as the courts have frequently pointed out, a litigant, by a pretended claim for equitable relief, might deprive his opponent of advantages incident to an action at law."

In 19 Am. Jur. page 132, it is stated:

> "If the facts which are relied on to sustain equity jurisdiction fail of establishment, the court may not retain the case for the purpose of administering legal relief."

In the case of *Welsh* v. *Bayaud*, 21 N. J. Eq. 186, the court said of the complainant's request that a decree be made that the defendant repay money paid on account of a contract the specific performance of which was sought (p. 187):

> "The Complainant may have the right to recover this money, but his remedy is at law, not in equity. * * * The complainant having failed on his only ground for equitable relief, cannot have his suit retained for granting a relief to which he is only entitled at law."

In *Soper* v. *Conly, supra,* the Court of Errors and Appeals of New Jersey stated at page 538:

> "To give and continue in the court below, jurisdiction, it was necessary that the fraud alleged should be established. Appellants having failed in this direction the court of chancery was without jurisdiction to proceed further and the bill of complaint should then have been dismissed. Notwithstanding this the learned vice chancellor proceeded to hear and pass upon the question of the title to the lands contracted to be conveyed. While we do not stand in disagreement with him, upon the proofs, as to the result reached in this respect, nevertheless, under the circumstances, he exceeded the jurisdiction of the court in which he was sitting."

A recent authority in support of the proposition that Chancery will not take jurisdiction where there is an adequate remedy at law is *Kolodny* v. *Quality Bilt Furniture Co. Inc.*, 131 N. J. Eq. 248, wherein it is stated of the defendant's claim, on page 249:

> "Essentially his claim, if established, would be nothing more than an action for damages and breach of contract * * *"

"* * * His remedy, if any, is at law on the contract."

The Court of Errors and Appeals of New Jersey in *Stein* v. *Elizabeth Trust Co.*, 126 N. J. Eq. 399, said in part (p. 403):

> "The action, simply stated, was for the recovery of a judgment based upon a debt arising by implication of law * * *. The relation of a bank to a trustee-depositor is that of creditor and debtor. *New Amsterdam Casualty Co.* v. *National Newark and Essex Banking Co.*, 117 N. J. Eq. 264, 271; affirmed, 119 N. J. Eq. 540, and this *relationship, per se, gives rise to no equitable consideration.*" (Italics mine.)

Due process of law has been defined by this Court as requiring "That the court which assumes to determine the rights of parties shall have jurisdiction". *Twining* v. *New Jersey*, 211 U. S. 78, 110; *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8.

In *Scott* v. *McNeal*, 154 U. S. 34 at page 46, this Court said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> The words, 'due process of law', when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a

determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' *Pennoyer* v. *Neff*, 95 U. S. 714, 733."

In Zoline's Federal Appellate Jurisdiction and Procedure. Rights and Forms. Third Edition. Page 168, Section 298 it is stated:

"Due Process" applied to judicial proceedings.

"The system 'due process of law,' when applied to judicial proceedings mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit;* and if that involves merely a determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State, or his voluntary appearance."

In *Reynes* v. *Dumont*, 130 U. S. 354, this court said at page 395:

"It was held in *Lewis* v. *Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make an appropriate case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs* v. *Spain*, 15 Wall. 211."

In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18 at page 25, this court said:

"Jurisdiction as to the subject-matter may be limited in various ways, as to civil and criminal cases;

cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and *in that sense the Court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther.* And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review." (Italics mine.)

POINT II.

The adjudication by the Court of Chancery of petitioner's legal rights being void as constitutionally beyond its jurisdiction, its decree permanently restraining the trial of those rights in a law court of competent jurisdiction deprived petitioner of his rights without due process of law and denied him the equal protection of the laws.

By reason of the injunction of the Court of Chancery which has been affirmed by the Court of Last Resort of the State of New Jersey, petitioner is deprived of his day in a court of competent jurisdiction. Petitioner having failed to establish his right to equitable relief, the Court of Chancery was without jurisdiction to determine petitioner's legal rights. Chancery's assumption of such jurisdiction was unconstitutional and its determination is therefore a nullity and of no effect.

The injunction prevents a determination in a court of competent jurisdiction of petitioner's legal rights. Petitioner originally sought relief at law (R., p. 39). In the law action he asserted legal rights and asked for legal relief (R., pp. 46, 47). The Court of Chancery decided

that petitioner's rights, if any, were of a legal nature. The law is settled that when the Court of Chancery denied equitable relief, that court was without jurisdiction to determine the legal rights of the petitioner.

Only in the event that the Court of Chancery found that a partnership or joint adventure, in fact, existed, would it have had the power and jurisdiction to determine "how much, if anything" was due petitioner from respondent. In other words, there was no prayer for general relief in petitioner's counterclaim (R., p. 83, par. 7) nor was there any issue raised thereunder as to "how much, if anything, was due" except in the event a partnership or joint adventure was found, by the Court of Chancery, to have existed between the parties.

Once the Court of Chancery determined the petitioner was a mere employee, the Chancellor, under the New Jersey State Constitution and under the decisions of the Court of Chancery and the Court of Errors and Appeals of New Jersey, was wholly without power and jurisdiction to retain the cause and determine the purely *legal* issue, as to an employee's right to compensation for services. Furthermore, there was no proof before the Court of Chancery as to petitioner's legal right to damages for breach of contract nor as to the reasonable value of his services nor could such proof have been properly offered before that Court.

Even if the determination by the Vice Chancellor that there was no express contract as claimed by petitioner were conclusive, nevertheless, in any event the petitioner cannot be deprived of his right to enforce his claim for the reasonable value of his services. Such a claim was included in his prior pending action at law. The second count in the complaint therein is upon *quantum meruit.*

The issues under the second count for *quantum meruit* in the action at law were not raised in Chancery and it would have been improper so to raise them. No proof was before the Vice Chancellor as to the value of petitioner's services.

An action on *quantum meruit* is different and distinct from an action for breach of an express agreement. *Kirkpatrick* v. *McElroy*, 41 N. J. Eq. 531, see also *Freeman on Judgments*, 5th Ed., Section 736:

> "Failure to recover in an action on an express contract does not bar an action on an implied contract arising from the transaction."

The exclusive jurisdiction of the New Jersey Supreme Court to determine all legal issues raised under petitioner's action at law is established by the decisions of the New Jersey courts relied on and referred to under Point I.

THE PETITIONER CANNOT BE DENIED RELIEF IN CHANCERY AND AT THE SAME TIME ENJOINED FROM PROCEEDING AT LAW.

In *Collier* v. *Collier* (N. J. Chan.), not officially reported, 33 At. Rep. 193, at page 193, it is said:

> "When an action at law is sought to be restrained by suit in equity, and part of the grounds upon which the bill rests are purely of equitable cognizance, and part, when considered separately, are strictly of legal cognizance, and the proofs do not establish the allegations which are of purely equitable cognizance, a court of equity has not jurisdiction to further restrain the action at law, and proceed to determine the legal rights of the parties. * * *"
>
> "A moment's reflection will satisfy every one that nothing could be more mischievous than the adoption of the principle contended for by the complainant. In such case it would only be necessary for the defendant in an action at law to make some pretense of claim against the plaintiff in such action of fraud, mistake, accident, or right to an account, in order to change the forum of litigation, and to compel the determination of questions purely legal in a court of equity" (p. 194).

In *Dowell* v. *Mitchell*, 105 U. S. 430 at page 432, this Court stated:

> "The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should have dismissed the bill without prejudice." (Citing cases.)

The courts of New Jersey cannot take away all remedy for the enforcement of petitioner's right to compensation for his services. "To take away all remedy for the enforcement of a right is to take away the right itself. *Poindexter* v. *Greenhow*, 114 U. S. 270, 303.

It follows therefore that since the Court of Chancery was without jurisdiction to determine the issues raised under petitioner's action at law, its decree preventing a determination of petitioner's legal rights by the Supreme Court, which under the New Jersey State Constitution is exclusively vested with such jurisdiction, is violative of the Fourteenth Amendment of the Constitution of the United States in that such injunction deprives the petitioner of the equal protection of the laws and of the right to due process of law.

POINT III.

Petitioner Made No Election of Remedies.

The New Jersey Court of Errors and Appeals, in its majority opinion held that petitioner had made an election of remedies (R., p. 453). This was not so. It cannot be said that petitioner abandoned his action at law. The record discloses that he repeatedly raised the jurisdictional question (R., pp. 54, 105, 194, 199, 23) nor can it be said that the Court of Chancery had jurisdiction by reason of petitioner's counterclaim.

Petitioner's counterclaim did not submit petitioner's legal rights to the Court of Chancery. It asked that the Court of Chancery determine whether petitioner's rights were equitable, and, if it so determined (R., 82, par. 3) that such equitable rights be enforced. Neither by affirmative action nor by consent, nor by acquiescence, did petitioner attempt to submit his rights, if legal, to the jurisdiction of that Court. Even if petitioner had done so, that Court would not have acquired jurisdiction. The settled rule is that jurisdiction cannot be conferred by consent of counsel nor by reason of the acquiescence of a vice chancellor.

San Giacomo v. *Oraton Inv. Co., supra;*
Richman v. *Schwartz, supra:*
M. C. & L. M. Railway Co. v. *Swan,* 111 U. S. 379.

In *Boro of West Long Branch* v. *Hoch,* 99 N. J. Eq. 356, the court stated:

> "It is enough to say in disposing of the contention that counsel cannot, by mere silence or by express consent, confer upon courts of equity the power to determine litigated matters which, under our judicial system, must be settled in a court of law; or, stated in another way, strip the law courts of jurisdiction conferred upon them under the constitution and transfer it to courts of equity."

In 18 Am. Jur. page 152, it is stated that—

> "No election of remedies occurs where the equity suit proves fruitless or unavailable" citing *Mills* v. *Parkhurst,* 126 N. Y. 89.

Even if petitioner had himself gone into chancery originally alleging an equitable relation he would not be estopped from thereafter instituting an action at law if Chancery had determined that the relationship was not in fact equitable.

The choice of a fancied remedy and the futile pursuit of it because either the facts turn out to be different from what the parties supposed them to be or the law applicable to the facts is found to be other than supposed and although the first action proceeds to judgment does not preclude the plaintiff from thereafter invoking the proper remedy.

Ash Sheep Co. v. *U. S.*, 252 U. S. 159 wherein the Court said at page 170:

> "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding."

In *Barton* v. *Silver*, 107 N. J. Eq. 314, it was held that where remedies in several courts are different, jurisdiction in one is not effected by proceeding in another.

Mere election of remedies is not an irrevocable choice between alternative and inconsistent substantive rights and is not a bar to the later pursuit of the proper remedy.

Schenk v. *State Line Telephone Co.*, 238 N. Y. 308;
U. S. v. *Oregon Lumber Company*, 260 U. S. 290;
Clark v. *Kirby*, 243 N. Y. 295;
Dickson v. *Patterson*, 160 U. S. 584.

Chancery's jurisdiction was limited to the original inquiry as to jurisdiction (*Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25). When it found no equitable relationship, the Court of Chancery "cannot go farther."

Therefore under Chancery's own finding, there was only one remedy available to the petitioner, and that was his action at law which was and is pending in the Supreme Court.

CONCLUSION.

It is clear, therefore, that, under the Constitution of the State of New Jersey the Court of Chancery was wholly without jurisdicion and power to determine the purely legal claim of the petitioner for damages for breach of contract and for the reasonable value of his services upon *quantum meruit* as such rights are legal and exclusively cognizable by the New Jersey Supreme Court in which petitioner's prior action is pending and which petitioner is enjoined from prosecuting by injunction of the Court of Chancery which has been affirmed by the New Jersey Court of Errors and Appeals.

It is equally clear that the affirmance by the New Jersey Court of Errors and Appeals of the decree of the Court of Chancery perpetually enjoining and restraining the prosecution of petitioner's action at law deprived petitioner of due process of law and of the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States.

The writ of certiorari should be granted and upon final hearing the final decision and decree of the New Jersey Court of Errors and Appeals affirming the decree of the Court of Chancery and the decree so affirmed should be reversed, set aside and for nothing holden.

August 17, 1943.

Respectfully submitted,

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(12)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943. No. 268.

GEORGE C. BENNETT,
Petitioner,

vs.

JULIUS DE GEETER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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OCTOBER TERM, 1943. No. 268.

GEORGE C. BENNETT,
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vs.

JULIUS DE GEETER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of Facts and Issues.

Bennett, the petitioner in this proceeding, sued De Geeter in the New Jersey Supreme Court alleging that a contract had been breached. The complaint was very inartistically drawn and it was most difficult to ascertain precisely the theory of Bennett's cause of action. The trial judge before whom two express motions were argued, to strike the bill, was of this opinion—see pages 58 and 59 of State of Case.

After the motions to dismiss were denied, an answer was filed and issue joined. Pursuant to the New Jersey Statute, Bennett was then examined as a witness before trial. At the examination he testified unequivocally and clearly that he was a partner. Under the New Jersey Law,

partnership actions are cognizable only in the Court of Chancery.

Thereupon De Geeter filed a bill in the State Court of Chancery alleging that Bennett's action was an equitable one. After a hearing, the Chancellor issued a preliminary injunction restraining the action at law. Bennett's counsel then moved to strike the bill and this motion was denied. Instead of taking an appeal, Bennett submitted to the jurisdiction of the Court of Chancery, filing an answer and counterclaim. In the counterclaim he specifically asked the court:

> "to construe the relationship between the parties and sought a dissolution and an accounting in the event the Chancellor found that a partnership or joint venture, in fact existed." (See page 3 of Petitioner's Petition for Writ of Certiorari.)

The counterclaim is replete with allegations that he had no remedy at law. See paragraphs 28, 29, 36, 37, 38 and the introductory language to the prayers found on page 82. In the petition filed in this court by Bennett, he concedes that he filed such a counterclaim asking for a construction of the relationship between the parties, etc., (see page 3 of Petitioner's Petition for Writ of Certiorari).

Furthermore, in the Chancery proceedings, Bennett testified that he was a partner and his own counsel (R. p. 312) made this statement:

> "There is no question about the partnership."

Therefore, the issue joined in Chancery and the one to be determined by that court, was the exact relationship existing between the parties.

The Chancellor ruled that Bennett was a mere employee who had been fully compensated for his services. The counterclaim was dismissed and the action at law permanently enjoined.

Bennett then took an appeal to the court of last resort, i. e., the Court of Errors and Appeals. This court has jurisdiction to correct both errors of law and fact. That court affirmed the decision of the Chancellor.

To recapitulate at this point, there never was any question but that the dispute was properly in the state court. The only issue aside from the fact question, was—which state court had jurisdiction? Was it the Court of Chancery, or was it the New Jersey Supreme Court? The tribunal charged with resolving this dispute, is the New Jersey Court of Errors and Appeals. It ruled that the decree of the Chancellor was proper. Such a ruling is dispositive of the entire issue. Whether one state court or the other has jurisdiction over a given controversy is a matter of pure local concern. No federal question is involved.

POINT ONE.

There Is No Federal Question Presented by the Record.

The authority of this court to issue its writ is contained in *Title 28, Section 344 (B)*. That statute provides:

> "Or where any title, right, privilege or immunity is specifically set up or claimed by either party under the constitution or any treaty or statute of, or commission held or authority exercised, the United States."

This court has also by its Rule 38, paragraph 5 (A) provided:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

There was no dispute below that the Court of Chancery had jurisdiction over the general subject matter. The following state cases are dispositive:

Bowne v. *Windsor,* 106 N. J. Eq. 415;
Wiley v. *Wirbelauer,* 116 N. J. Eq. 391;
Cooperstein v. *Shapiro,* 118 N. J. Eq. 337;
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Jackson v. *Hooper,* 76 N. J. Eq. 185;
Gulick v. *Gulick,* 14 N. J. Law 578;
Davis v. *Minch,* 88 N. J. Law 214;
Savage v. *Dowrie,* 111 N. J. Eq. 108;
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Kurth v. *Maier,* 133 N. J. Eq. 388.

By his counterclaim, Bennett, not once but many times, alleged that he had no adequate remedy at law. From the decree of the Chancellor he appealed to the Court of Errors and Appeals and asked that court to reverse the decision of the Chancellor on the facts. He asked the appellate court to award him a decree on his counterclaim. The only dispute now sought to be brought to this court is this: It is claimed that the Chancellor exceeded his jurisdiction when

he restrained the action at law. Bennett's contention now is, that despite the fact that all of the issues were adjudicated upon, that he still has a right to sue in the law court on a *quantum meruit* theory.

If we may refer to the petitioner's own brief in this court under the heading "Conclusion" on page 17, it is said that under the Constitution of the State of New Jersey, the Court of Chancery was without jurisdiction to determine this question, but under the New Jersey State Constitution such jurisdiction was conferred on the Supreme Court. The difficulty with this contention is that the New Jersey Court of Errors and Appeals has ruled that the Court of Chancery did have jurisdiction. That decision is dispositive of the issue. The New Jersey Court of Errors and Appeals is the supreme arbiter on questions of state court jurisdiction. The federal courts have no jurisdiction to determine which of two state courts should entertain a given controversy. The determination of the state courts that the State Constitution has not been infringed is binding on this court. *Brown* v. *New Jersey,* 173 U. S. 172; *Baldwin* v. *Kansas,* 129 U. S. 52; *Bank of Hamilton* v. *Dudley's Lessee,* 2 Pet. 492; *Elmendorf* v. *Tailor,* 10 Wheat. 152; *Herbert* v. *Louisiana,* 272 U. S. 312; *Buchalter* v. *New York,* Advance Reports, Volume 87, No. 17, page 1088.

The following excerpts from these cases are pertinent:

As was well said by this court in *Buchalter* v. *New York, supra:*

> "But the amendment (Fourteenth Amendment) does not draw to itself the provisions of state constitutions or state laws."

In the case of *Baldwin* v. *Kansas, supra,* this court held:

> "The question whether the evidence in the case was sufficient to justify the verdict of a jury, and the question whether the Constitution of the state was complied with or not in the proceedings on the trial, are not federal questions which this court can review."

In the case of *Herbert* v. *Louisiana, supra,* this court held:

> "The due process of law clause of the 14th amendment does not enable the Supreme Court of the United States to revise decisions of the state courts on questions of state law."

So in *Brown* v. *New Jersey, supra,* this court held:

> "The decision of the highest court of a state that a statute is not in conflict with the constitution of the state is conclusive on the Federal Courts."

The petitioner is here attempting to ask this court to determine that the New Jersey Court of Errors and Appeals incorrectly decided that the New Jersey Court of Chancery had jurisdiction rather than the New Jersey Supreme Court. On the authorities above cited, this court will not attempt to decide this question.

Although it is not necessary for our discussion, it will not be amiss to point out that from time immemorial a Court of Chancery having obtained jurisdiction of a cause has the right to retain that cause for the purpose of affording complete relief. In *Pomeroy on Equitable Jurisprudence* Volume I, section 231 (Fifth Edition) it is said:

> "The rule has already been stated as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law."

In the State of New Jersey in the case of *Shaw* v. *Beaumont Co.*, 88 N. J. Eq. 333, our court of last resort in following this rule, has stated that it is a discretionary matter for the Chancellor whether he will retain the cause to afford complete relief. That discretion was exercised in the present case and affirmed by the Court of Errors and Appeals. In the petition filed with this court there is a suggestion that the respondent (De Geeter) feared the hazards of jury trial. The answer is complete. Jurisdiction over matters of partnership and joint adventure are, by New Jersey law, conferred on the Court of Chancery. The state statute, *R. S. 2:29-9*, provides that a jury trial may be had in the Court of Chancery, but is deemed waived unless demanded in the pleadings. No demand for a jury trial was made by Bennett in this particular case.

Although no question is raised in the brief submitted by Bennett to this court, there can be no question of jury trial here raised. Consistent with due process, trial by jury may be abolished by the state altogether. *Snyder* v. *Mass.*, 291 U. S. 97.

POINT TWO.

No Federal Question Was Raised in the State Court.

In the petition filed with this court, it is said that the constitutional question was raised in the New Jersey Court of Errors and Appeals. Reference is then made to page 7, paragraph O of the record. Such a claim is there set forth in the Petition of Appeal. It was not, however, argued. It is therefore deemed to be abandoned. *Sargeant Bros.* v. *Brancati,* 107 N. J. L. 84.

We are further told that the constitutional question was stressed in petitioner's brief. There is no reference to the page or pages of the brief where this question was stressed. As a matter of fact it was not even mentioned. There is no reference whatsoever to it in the opinion of the New Jersey Court of Errors and Appeals. The only jurisdictional question raised in Bennett's brief in the court below was the one that the decree was too broad. As stated above, this contention was decided against him and is dispositive of the question. Counsel for De Geeter, were never served with any application for any reargument in the New Jersey Court of Errors and Appeals. It cannot, therefore, be stated whether any federal question was raised in such application. But be that as it may, if raised for the first time on such an application, it is elementary that it will not be considered by this court.

Conclusion.

For the reasons above cited, it is respectfully requested that the application for certiorari be denied.

A sound public policy dictates that there should be an end to litigation. This is merely an attempt on the part of the petitioner to have this court decide purely local questions. No federal question is involved. Bennett was afforded an opportunity to be heard. The record below is voluminous. It indicates that every opportunity was afforded him to present his cause for determination. His contention was decided against him by two separate tribunals, each with fact-finding powers. Once the cause was properly before the Chancellor, it was but fitting and proper that he should determine the entire controversy, and not have it determined piecemeal. In his counterclaim, Bennett asked that De Geeter account to him for any moneys due and owing. It would be absurd to say that the Chancellor was without jurisdiction to determine that there was nothing owing from De Geeter to Bennett.

In concluding, it is well to call to this court's attention a mis-statement made in the moving papers. Reference is made to "lay" judges of the New Jersey Court of Errors and Appeals. There are no such judges. That court is composed of the Chancellor (who does not sit on appeals from equity), the Chief Justice and eight justices of the Supreme Court, together with six judges specially appointed. The Chancellor and the Justices of the Supreme Court are ex officio judges. The adjective "special" is used

to distinguish these judges from ex officio judges. *New Jersey State Constitution,* Article VI, Section II, paragraph 2.

Respectfully submitted,

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(13)

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IN THE

Supreme Court of the United States

October Term, 1943

No. 268

GEORGE C. BENNETT,
Petitioner,

v.

JULIUS DE GEETER,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent presents two contentions—

(1) That no federal question is presented by the record (Point One).

(2) That no federal question was raised in the State Court (Point Two).

These contentions are not sound.

As to Respondent's Point I

In support of his contention that no federal question is presented by the record respondent first points out that the authority for the writ sought is contained in Title 28, Sec. 344-B of the U. S. Code.

Respondent then cites Rule 38, par. 5 (a) of this Court as a limitation on that authority.

The rule attempts no such limitation: it expressly states that the reasons specified in par. 5 (a) are "neither controlling nor fully measuring the Court's discretion."

Respondent then asserts that "there was no dispute below that the Court of Chancery had jurisdiction over the general subject-matter" and cites fourteen New Jersey cases.

Respondent's assertion is not in accordance with the fact, nor do the cases cited by him sustain that assertion.

Respondent fails to define what he means by "general subject-matter", but his argument shows that he intends to have it understood by this Court that it means the legal rights of the petitioner and all of the issues raised in petitioner's original action at law. With respondent's assertion, having this meaning, there has always been a dispute by the petitioner. Petitioner instituted his original action upon his claim in the law courts of New Jersey. Thereafter, when he was brought into Chancery by the respondent, petitioner consistently maintained that Chancery was without jurisdiction over his claim at law, and, in his counterclaim in Chancery, did not ask for a complete determination of his rights but only asked that Chancery determine whether a partnership existed and if it determined that a partnership did exist then that it give him the appropriate relief.

It was expressly asserted by petitioner that if Chancery found that no partnership existed it should then dismiss the suit and remit him to his proper action at law (Record, p. 105). He did not concede that Chancery had the right to adjudicate upon issues of law, nor did he, by his affirmative action or by any failure to act, confer upon Chancery jurisdiction to determine such issues. No legal issues were raised by petitioner's counterclaim in the Chancery suit.

As a matter of fact, respondent's counsel in the argument before the Court of Chancery said:

"Now this case boils itself down to whether or not the parties were partners. If they were partners, my client has to account. If his client was merely an employee, then the counterclaim should be dismissed" (Record, p. 201).

Of the fourteen cases cited by respondent (Respondent's Brief, p. 4) not one supports the jurisdiction of the Court of Chancery to adjudicate the legal rights of a party where no equity has been found to exist.

Ten of the cases (*Bowne* v. *Windsor*, 106 N. J. Eq. 415; *Wiley* v. *Wirbelauer*, 116 N. J. Eq. 391; *Cooperstein* v. *Shapiro*, 118 N. J. Eq. 337; *Stein* v. *Spearin*, 120 N. J. Eq. 169; *Cooperstein* v. *Shapiro*, 122 N. J. Eq. 238; *Braddock* v. *Hinchman*, 78 N. J. Eq. 270; *Eugster* v. *Eugster*, 89 N. J. Eq. 531; *Jackson* v. *Hooper*, 76 N. J. Eq. 185; *Davis* v. *Minch*, 80 N. J. Law 214; *Savage* v. *Dowrie*, 11 N. J. Eq. 108) merely hold that the Court of Chancery has jurisdiction of an action where a partnership or joint venture exists, and they find that it does exist.

Two cases, namely, *Gulick* v. *Gulick*, 14 N. J. Law 578, and *Schedacher* v. *James*, 107 N. J. Law 400, were actions in the law courts on accounts stated after the partnership ended. In both cases motions to dismiss for want of jurisdiction in the law court were denied.

The other two cases support the proposition contended for by petitioner, that equity does not have jurisdiction to try the issues where it is found that a partnership or joint venture does not exist.

Vermeule v. *Vermeule*, 82 N. J. Eq. 531, was an action in Chancery to enjoin the prosecution of an action in the law courts which the Chancery defendant had brought on certain promissory notes. The plaintiff in the Chancery Court claimed that the notes formed part of a partnership transaction. The Court of Chancery held that the partnership had ceased before the notes were given, and dismissed the bill and dissolved the temporary injunction.

Kurth v. *Maier*, 133 N. J. Eq. 388, was also an action in Chancery alleging a joint venture between the parties in the purchase of certain shares of stock of the plaintiff with money advanced by the defendant. The defendant had failed to deliver the stock to the plaintiff when the latter repaid the money advanced. This is a very recent case, and the opinion, unanimously concurred in, was written by the Chief Justice of New Jersey. This case clearly defines the rule, and the application thereof, which petitioner contends applies to the case at bar. In his opinion, the Chief Justice says at page 390:

> "In our view, the facts exhibited in the bill of complaint do not make out a joint adventure. The decisions relied upon by the Vice Chancellor, wherein joint adventure was made out and Chancery had jurisdiction, to wit: Bowne v. Windsor, 106 N. J. Eq. 415; affirmed 108 N. J. Eq. 270; Cooperstein *v.* Shapiro, 118 N. J. Eq. 337; Jackson *v.* Hooper, 76 N. J. Eq. 85; reversed, 76 N. J. Eq. 592, are based on elements *fiduciary and equitable in nature*, not found in the bill filed in this cause. A joint adventure is an undertaking usually in a single instance to engage in a transaction of profit where the parties agree to share profits and losses. Equity may entertain jurisdiction *in such circumstances* upon principles that are applicable to partnerships, Braddock *v.* Hinehman, 78 N. J. Eq. 270. * * *.
>
> * * * The relationship of the parties was *pledgor and pledgee*—nothing more. If, as it is alleged, the covenants of the parties regarding the bailment of the stock certificates were breached by the defendant, the complainant has a complete and adequate remedy at law. The bill should have been dismissed" (p. 391).

Thus, following the reasoning in the very cases relied upon by respondent, it is clear that since the Court of

Chancery in the case at bar found that no partnership nor joint venture was made out, Chancery had no jurisdiction to determine the legal issues and to enjoin the trial of the same.

Respondent asserts (Respondent's brief, p. 4):

> "The only dispute now sought to be brought to this Court is this: It is claimed that the Chancellor exceeded his jurisdiction when he restrained the action at law. Bennett's contention now is, that despite the fact that all of the issues were adjudicated upon, that he still has the right to sue in a law court on a *quantum meruit* theory."

This does not accurately state the case nor is it the fact. Petitioner's claim is that the restraint of his action at law deprives him of his right to due process of law and therefore it is violative of the Federal Constitution. The issues asserted in the action at law were not raised by the pleadings in Chancery. Hence any adjudication of issues beyond the scope of the Chancery suit is a nullity. Furthermore, the Court of Chancery's jurisdiction was limited to a determination of the existence of an equitable relationship. That Court's right to decide strictly legal issues ceased when it found no equities between the parties and denied petitioner equitable relief.

Respondent asserts that the rule is that the determination by the highest court of a State as to the interpretation of the constitution of that State and the jurisdiction of its Courts is binding upon this Court.

The Court of Errors and Appeals in its decision did not construe the constitution of the State of New Jersey. If it had, the interpretation by the State court of the State constitution and its decision as to the jurisdiction of the State courts is subject to review by this Court if the result of such decision is to violate a provision of the federal constitution. See *Buchalter* v. *New York*, L. Ed. Advance

Reports, Vol. 87, No. 17, pp. 1088, 1089, and *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (both cases cited by respondent).

In *Buchalter* v. *New York*, this Court says (p. 1089):

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."

In *Hebert* v. *Louisiana*, this Court says (p. 316):

> "What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' "

Brown v. *New Jersey*, cited by respondent, is to be found in 175 U. S. 172 (not 173 U. S.) but we have been unable to find in the reported opinion the language quoted in respondent's brief. The case merely holds that the decision of a State Court that a State statute does not violate the State Constitution is binding on the Federal Courts.

The petitioner is not asking this Court to review a question under the constitution of New Jersey, but a question under the constitution of the United States.

The third step in respondent's argument is, that it is the rule that a Court of Chancery having obtained jurisdic-

tion of a cause has the right to retain that cause for the purpose of affording complete relief.

Respondent quotes in support of this a general statement to be found at the beginning of Sec. 231 of Pomeroy's Equity Jurisprudence, Fifth Edition, Vol. 1, page 410. As originally stated, it is not the rule. It should be noted that the learned editor of the Fifth Edition has appended a footnote to this statement in which he questions its accuracy. He also adds to the text at the end of Sec. 233, page 419, where he states:

> "The court (Chancery) will deal with legal questions only so far as their decision is incidental or essential to the determination of some equitable question. It will not retain jurisdiction to grant a purely legal remedy, or to try a claim for unliquidated damages."

Shaw v. *Beaumont Co.*, 88 N. J. Eq. 333, cited by respondent as authority for this New Jersey rule, actually holds to the contrary of respondent's contention, and is cited by the editor of the Fifth Edition of Pomeroy in support of his statement of the actual rule. The opinion does indeed contain dicta to the effect that where special equities are found to exist the Court of Chancery can retain jurisdiction and determine incidental legal issues also, but the Court expressly points out that where no equitable jurisdiction is found to exist Chancery cannot proceed to try the legal issues. The Court says (p. 335):

> "The clause in the agreement of February 26, 1913 providing for the conveyance of the property and the holding of it by the defendant until it should be paid, is the distinguishing feature between that agreement and the two preceding agreements referred to above. That clause is the sole ground, or the special equity, which gives the court of chancery jurisdiction over this cause":

and (p. 336):

> "In this case the defendant has an adequate and complete remedy at law, for all the items involved under the two former contracts, including damages for their alleged breach. *The Court of Chancery cannot retain jurisdiction for the purpose of granting a purely legal remedy or to try a claim for unliquidated damages. Trotter* v. *Heckscher,* 40 N. J. Eq. 657; *Phillips* v. *Pullen,* 45 N. J. Eq. 157." (Italics ours.)

In the case at bar the Court of Chancery by its decision that no partnership or joint venture existed between the parties has directly decided that no special equities exist. Having so decided, it was without jurisdiction to consider legal issues and assume to determine such issues.

The federal question is raised by the fact that the courts of New Jersey have denied to petitioner the right to have a trial of the legal issues. The value of petitioner's services as an employee or his legal rights under his contract of employment were not, and could not be, at issue before the Court of Chancery. The petitioner could not be expected to present to the Chancery Court evidence upon the purely legal issues, at his peril, when those issues were not before that Court and not within its jurisdiction.

On this point, this Court appears to have made a controlling decision, *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, Mr. Justice BRANDEIS there says (pp. 681-682):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support, undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede

> Sand & Improv. Co. case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary, or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Respondent appears to have completely misconceived petitioner's contention.

Briefly restated, petitioner claims the protection of the Fourteenth Amendment of the Federal constitution. The State of New Jersey, acting through its judiciary, has deprived the petitioner of due process of law and of the equal protection of the law. The State of New Jersey has destroyed petitioner's fundamental right to enforce his legal demand for damages and for the reasonable value of his services by denying to petitioner his remedy, *e. g.*, the right to proceed in the law courts with the trial of his legal issues.

That part of the Chancellor's decree which purports to determine petitioner's legal rights is null and void, first, because it is beyond the scope of the pleadings, and secondly, because the Chancery Court exceeded its jurisdiction as limited by "the law of its creation." To have gone beyond the scope of the issues raised before it and to have exceeded its jurisdiction was not due process. To prevent, by injunction, a trial in the Court where those issues have been raised and which, under the "law of its creation" has exclusive jurisdiction thereof, is a denial of due process and of the equal protection of the laws.

As to Respondent's Point II

The Federal question was raised in the State Court and was not abandoned.

Respondent (Respondent's brief, p. 8) admits that the Federal constitutional question was raised by petitioner in the petition of appeal to the Court of Errors and Appeals (Record, p. 7, par. O), but asserts that "it was not even mentioned" in petitioner's brief in that Court. The last paragraph on page 77 of petitioner's (appellant's) brief in the Court of Errors and Appeals reads:

> "The decree and the injunction therein granted is violative of and repugnant to the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant-appellant of his property without due process of law and denies the said defendant-appellant the equal protection of the law."

The above paragraph is the conclusion of Point Five of petitioner's (appellant's) brief, which dealt with the effect of the injunction as a denial of petitioner's fundamental rights. We submit that this is far from being an abandonment of the Federal question.

The Federal constitutional question was again raised on page 6 of petitioner's petition for reargument in the Court of Errors and Appeals. The practice in that Court does not require that such petition be served upon opposing counsel.

Petitioner was not bound to assume that the Vice-Chancellor would violate the provisions of the Federal constitution, that he would enjoin the trial of the action at law when he found that no equitable jurisdiction existed, or that the Court of Errors and Appeals would sustain the Vice-Chancellor in such violation.

Petitioner raised the Federal constitutional question in his petition of appeal to the Court of Errors and Appeals and in his brief before that Court. The fact that the Court of Errors does not discuss the constitutional question in its opinion is entirely irrelevant. By failing to do so it could not prevent petitioner from raising that question or from seeking to bring the same before this Court (*Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, at page 231).

When petitioner became for the first time aware that the Court of Errors and Appeals had violated the Federal constitution by its affirmance of the injunction, as petitioner did only after the decision of that Court, he then immediately again raised the Federal constitutional question by his application for reargument before that Court.

Petitioner could not do more, and what he did was ample, and it was done in time.

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673, 677-678;

Chicago, Burlington & Quincy R. R. Co. v. *Chicago,* 166 U. S. 226.

CONCLUSION

The Writ Should Be Granted

Respectfully submitted,

ELLWOOD THOMAS,
Of Counsel with Petitioner.

EDOUARD L. DUNNE,
Solicitor for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1943

No. 268

GEORGE C. BENNETT,
Petitioner,

v.

JULIUS De GEETER,
Respondent.

PETITION FOR A REHEARING UPON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

ELLWOOD THOMAS,
Counsel for Petitioner.

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To the Honorable The Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, George C. Bennett, respectfully petitions that a rehearing be granted upon his petition for a writ of certiorari upon the following grounds:

The State of New Jersey, in the instant case, has swept away petitioner's fundamental rights as a citizen of the United States and as a creature of God.

Unless this Court will enforce petitioner's rights as a citizen of the United States as guaranteed him by the Federal Constitution, he must stand as a laborer who was *not* worthy of his hire, he will have given of the sweat of his brow and yet is to be denied the bread for him to eat. Moreover, petitioner will have been deprived of his

property without due process of law and denied the equal protection of the laws.* His right to have disputed issues of fact in his action at law decided by a jury will have been denied him.

The treasure and blood of this Nation are being poured out to defend our constitutional system of government. That system includes the guaranty of the rights of the humblest of its citizens. The right to due process and to the equal protection of the laws are as fundamental as the right to freedom of speech and religion and would be among the first privileges this Nation's enemies would destroy. Encroachments upon any of these rights are injurious to the public interest and should not be tolerated.

It is axiomatic that no man can accept the benefits of the labors of another without compensating him. Our American way of life does not countenance a system whereby one man is to be enriched at the expense of another. American justice is equal to all alike. Just as the executive and legislative branches of our government consider the welfare of the individual to be a matter of national interest so also does the judicial branch consider the denial of equal justice to an individual to be a matter of national interest.

In the instant case, Bennett is seeking to recover compensation for services rendered by him for a period approximating 12 months and for which De Geeter admits he did not pay him. The explanation being "I didn't have a chance to pay him" (R. p. 167; also p. 431). The services were substantial and valuable. De Geeter received the benefit of Bennett's work. Bennett's right to recover the reasonable value of his services is a fundamental inalienable right. One of the purposes of the 14th Amend-

* The point upon which this Federal Question turns is that petitioner's right to recover the reasonable value of services is not within any issue which the parties set out to try in Chancery or that in point of fact they did try.

ment of the Federal Constitution was to guarantee against an abridgement of such a right by any of the States. However, the State of New Jersey has destroyed such right on Bennett's part. The State of New Jersey, acting through its judiciary, has permanently enjoined Bennett from prosecuting his action to enforce his right to compensation.

The petition for the writ of certiorari and the briefs in support and in opposition to that application all dealt at length with the mooted question of equity jurisdiction. This was done because the error of the Courts of New Jersey on this point was so manifest that petitioner considered it advisable to lay it before this court. However, as correct as petitioner was in his contention and as flagrantly wrong as the New Jersey Court of Errors was on this point, this Honorable Court may have concluded that no matter of Federal jurisdiction was therein involved.

This petition for rehearing is filed for the definite purpose of focusing the court's attention upon the injunction which prevents Bennett from enforcing his common law right to recover the reasonable value of his services. The dispute in the courts below involved an alleged express agreement and the relationship of the parties that grew out of it. It may be that the question as to whether or not Bennett has had his day in court under this alleged express agreement presents no federal question and notwithstanding the votes of the Chief Justice and 4 of the Justices of the New Jersey Court of Errors and Appeals to reverse the Chancellor's decree, Bennett may be barred and precluded from a second trial in another forum *on that issue.* But, assuming this to be so and that no Federal Question is thereby involved, the denial of Bennett's right to a trial before a jury of his fundamental right to recover the reasonable value of services rendered by him and the benefit of which was accepted by De Geeter, raises a Federal Question which is of towering im-

portance. It cannot be contended that Bennett has had his day in Court in any sense upon his claim for *quantum meruit* compensation nor that such claim has been adjudicated. It was not in the pleadings before the Court of Chancery nor was any evidence adduced upon that issue. The adjudication of the Chancellor that "no monies were due and owing" Bennett, must be read in the light of the pleadings in the equity suit and the only construction and interpretation to be given such adjudication is that there are no monies "due and owing" under the express agreement alleged by Bennett in his counterclaim in that suit (R. p. 9).

From October, 1936 to September, 1937 which was the period of the construction of the rink and prior to the time referred to in the Chancery complaint, Bennett, who was an experienced building and construction man (R. pp. 300, 301) gave of his time, skill and experience for about a year in the planning and construction of the rink. It was Bennett who approved the site (R. p. 306), graded it (R. p. 240), arranged for the surveying (R. p. 244), prepared the plans (R., Exhibit D-5, p. 442, also p. 308), prepared the material lists (R. pp. 286, 316), placed the orders for materials and pledged his own credit therefor (R., Exhibit D-7, p. 447), supervised the laying of the foundation (R. p. 246), arranged for the hauling, erected the steel trusses (R. pp. 253, 289), arranged the roofing contract (R. p. 292), superintended the entire construction (R. pp. 240, 246, 250, 253, 289, 292). He thereby established De Geeter in a highly profitable business. Bennett was not paid for this work. He claimed his compensation was to be measured by a percentage of the profits from the enterprise. He commenced an action at law alleging two counts—under the first count the terms of the express agreement and

sought money damages for its breach—under the second count Bennett asked the reasonable value of his services.*

De Geeter joined issue and two years later, fearing a trial by jury and while the law court was in summer recess, De Geeter filed a bill in chancery praying for an injunction restraining Bennett from proceeding with his law action. In his bill (R. p. 30) De Geeter alleges as the period of employment only the time subsequent to the opening of the rink, and subsequent to the rendition of the services for which Bennett on any theory has not been paid and for which he seeks a recovery. De Geeter alleged that during this subsequent period Bennett was an employee in the rink but that Bennett was seeking an interest in a partnership. Bennett put in a counterclaim in that court. He asked the Chancellor to determine if he was a partner and, if so, to give him an

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* The law in New Jersey is clear and definite that if Bennett failed in proving the express agreement he could nevertheless recover the reasonable value of his services under his second count.

Harris, Pleading and Practice in New Jersey (Revised Ed.), sec. 315, page 318: "* * * in case one may fail to set forth or prove an express contract, he may yet be able to recover on an implied contract for the reasonable value of services performed or material furnished."

Kirkpatrick v. *McElroy,* 41 N. J. Eq. 539 (earlier case, 37 N. J. Eq. 137, at p. 140), wherein the failure to establish an express agreement for a percentage of profits was held to be no bar to a recovery upon *quantum meruit. Heywood* v. *City of Buffalo,* 14 N. Y. 534; *Water C. & G. Co.* v. *Hutchinson,* 160 Fed. 41; 19 L. R. A. (N. S.) 219; *Freeman on Judgments,* 5th Ed., sec. 736; *McKeon* v. *Van Slyck,* 223 N. Y. 392.

"Where the complaint counts upon a special contract and the plaintiff fails in establishing the same, but does show that in fact services were rendered, he may recover upon *quantum meruit.* Such rule has long been the settled law (*Sussdorff* v. *Schmidt,* 55 N. Y. 319); *Rubin* v. *Cohen,* 129 App. Div. 395.

"Although the party seeking to recover on the special count fails altogether, he may recover on the common counts, provided the case is such that, supposing there had been no special contract, he might still have recovered." *7 Corpus Juris Secundum* 126.

accounting. Otherwise Bennett insisted he be allowed to proceed with his law action. The Chancellor determined that Bennett was not a partner but was an employee "who received a fixed compensation during the period of his employment". Such period of employment, however, could only be the period defined by the bill itself (R. p. 30) which does not include the period in which Bennett rendered the services for which he seeks to recover compensation.

Our quarrel here is not with the determination of the Chancellor that a partnership did not exist or that Bennett received compensation for the period subsequent to September, 1937. Our quarrel is with the refusal of the Court to permit a trial of Bennett's claim for the reasonable value of the services which were concededly rendered by him prior to September, 1937. There has been no trial of those issues anywhere and the injunction bars petitioner from having them tried, and it is the injunction which constitutes the denial of due process and of equal protection and which raises the Federal Question.

Petitioner's right to recover upon *quantum meruit* is not at all affected by the dismissal of his counterclaim in chancery for an account of profits. As was said in *Buckingham* v. *Ludlum,* 37 N. J. Eq. 137 at page 141:

> "In the first he was seeking to enforce an express contract, which entitled him to a specific share of the profits, regardless of the value of the services he had contributed in earning them; while that which he is now prosecuting, is based exclusively on the fact that he had rendered valuable services to this firm, at their request, without stipulation as to price, but under a promise implied by law, that he should be paid what his services were reasonably worth. A judgment in the first case, adjudging either that the contract on which that suit was founded, was not proved, or that the contract was invalid, it is obvious, could not touch, even collaterally, the question whether

the petitioner had rendered services for which, in justice, he ought to be paid. The petitioner's present claim is unaffected in any way, in my judgment, by the judgment pronounced against him in the previous suit''.

De Geeter's brief in opposition to the application to this court, contained erroneous statements of fact and an array of New Jersey authorities which not alone failed completely to support De Geeter's contention but rather showed clearly the law as urged by Bennett. Furthermore, the New Jersey authorities cited by De Geeter established the instant matter as a case standing alone and in direct conflict with the judicial precedents of that State.*

Petitioner prepared and filed with this Court a reply brief which completely dispelled the contentions raised in respondent's brief; but, unfortunately, the reply brief was filed with this Court virtually *on the eve of the decision* denying the petition was announced. The petitioner is constrained to believe that this Court may not have had an opportunity to consider the reply brief to which petitioner now respectfully refers it.

In his reply brief, petitioner clearly showed that:

The Federal question was not only raised in the State court but actually urged in his brief before that court.

Respondent utterly failed to meet petitioner's contention that the restraint of the law action is a deprivation of due process.

The New Jersey cases cited by respondent did not support his contention but rather sustained petitioner's position throughout the litigation in the State courts.

The decision of the Court of Errors and Appeals in the case at bar is clearly in conflict with applicable

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* See pages 3, 4, 7, Petitioner's Reply Brief.

decisions of this Court. *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8; *Twining* v. *New Jersey*, 211 U. S. 110; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673.

Briefly stated, petitioner claims the protection of the Fourteenth Amendment of the Federal constitution. The State of New Jersey, acting through its judiciary, has deprived the petitioner of due process of law and of the equal protection of the law. The State of New Jersey has destroyed petitioner's fundamental right to enforce his legal demand for damages and for the reasonable value of his services *by denying to petitioner his remedy, e. g.*, the right to proceed in the law courts with the trial of his legal issues.

The Federal Question is presented by the record for this reason: the Chancellor's decree, as affirmed, contains an injunction which perpetually enjoins Bennett from proceeding with his action at law. It is the injunction that prevents Bennett from enforcing his right to recover upon *quantum meruit* the services rendered prior to September, 1937, which is the claim set forth in his second count of his complaint at law (R. pp. 46, 47). The Chancery decree (except for the injunction) is not a bar to a recovery upon such claim under *quantum meruit* nor is it *res adjudicata* as to such claim. It would almost appear that in giving consideration to the involved and unusual question of the Chancellor having exceeded his jurisdiction that the courts dealing with this matter have heretofore overlooked the restraint contained in the Chancellor's decree and the effect of that restraint as being a denial of due process of law and of the equal protection of the law.

So long as this injunction stands, Bennett cannot proceed to enforce his right to recover the reasonable value of his services rendered prior to September, 1937; and this, notwithstanding De Geeter's own counsel on the oral argument before the New Jersey Court of Errors and Appeals

opening stated that it was never intended that the injunction should operate against the second count in the law action.

In granting a rehearing and issuing its writ of certiorari in the *Brinkerhoff-Faris case* (*supra*) this Court had before it a case wherein all remedy for the enforcement of a right had been denied by the State Court. For precisely the same reason certiorari ought to be granted in the instant case.

Conclusion

This Court is asked to grant a rehearing and issue its writ of certiorari to the New Jersey Court of Errors and Appeals, to the end, at least, that *the injunction* of the Court of Chancery which enjoins petitioner from prosecuting his prior pending action at law may *be dissolved insofar as it relates to* and presents a trial of the issues raised in the *second count* of petitioner's complaint at law for the reasonable value of his services.

Respectfully submitted,

ELLWOOD THOMAS,
Counsel for Petitioner,

EDOUARD L. DUNNE,
Solicitor for Petitioner.

CERTIFICATE OF COUNSEL

I, ELLWOOD THOMAS, of Counsel for the above named petitioner, hereby certify that the foregoing petition for Rehearing is presented in good faith and not for delay.

ELLWOOD THOMAS.